In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 930

JOSEPH L. SANAPAW, WILLIAM J. GRIGNON, AND FRANCIS BASINA, PETITIONERS

v.

STATE OF WISCONSIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's request of May 4, 1964, for the views of the United States.

1. The question is whether the Menominee Termination Act, providing that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction," impliedly exempted the tribe's hunting and fishing rights from the operation of State conservation laws. The Supreme Court of Wisconsin held that there was no basis for reading such an exemption into the Act. We think that conclusion was correct.

Prior to the Termination Act, the right of the Menominees to hunt and fish on lands within the

733-113—64

reservation was a normal incident of their ownership (or possession) of those lands. Because of the settled policy of Congress to preserve tribal sovereignty, it is well established that the States are without jurisdiction to regulate the conduct of Indians within a reservation. Cohen, *Federal Indian Law* (1956 ed.) 512–513. It was by virtue of this general doctrine, and not because of any special rights conferred upon them by the Treaty of 1854, that the Menominees enjoyed immunity from State game laws. By ending federal supervision over what had formerly been the Menominee Reservation, and by making State laws fully applicable thereto, the Termination Act placed the Menominees on the same footing as other landowners within the State.

The Court has frequently declared that Indian hunting and fishing rights on lands outside a reservation, even though expressly guaranteed by treaty, are subject nonetheless to regulation (other than the imposition of licensing fees) by the State. *Ward* v. *Race Horse,* 163 U.S. 504; *Tulee* v. *Washington,* 315 U.S. 681, 684 (dictum); *Kake Village* v. *Egan,* 369 U.S. 60, 75. Thus, in *Tulee,* the Court stated (315 U.S. at 684) that such a treaty "leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish * * *." The effect of the 1954 Act, we submit, was to terminate the reservation status of the Menominee lands and to subject hunting rights on those lands to the same State conservation regulations which would

apply to Indian hunting rights, if any, outside a reservation.

The result might conceivably be different if the Treaty of May 12, 1854 (Pet. 46) creating the Menominee Reservation had purported to confer hunting rights of greater dignity than those incidental to the ownership of property—rights amounting to a permanent immunity from State regulation.[1] In that event, there might be some basis for the argument that Congress would not have abrogated such treaty guarantees without expressly referring to them. But we find nothing in the 1854 Treaty which would support that construction. The mere fact that the ceded lands were "to be held as Indian lands are held" (Pet. 47) provides no such support. For the quoted language plainly has to do with the nature of the property rights conferred (whether fee simple title; beneficial ownership; or some possessory interest, such as right of use and occupancy), not with the amenability of those rights to State regulation. See Cohen, *Federal Indian Law* (1956 ed.) 604–606. It is not entirely clear what form of tenure Congress intended to grant (*id.* at 606). Even on the most generous interpretation, however, the language of the grant could have

[1] An example of a treaty purporting to confer such immunity, though not confined to hunting and fishing rights, is the Treaty of May 6, 1828, giving the Cherokee Nation:

> * * * *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *

meant no more than that the lands were to be held in fee simple absolute—which, of course, would not, as a matter of treaty guarantee, exempt them from otherwise applicable State regulation.[2]

2. The decision below will have a substantial economic impact on the 3,200 members of the Menominee tribe. Moreover, provisions such as that contained in the Menominee Termination Act, making State laws applicable to the tribe and its members, are contained in other termination statutes.[3] The termination of federal supervision over the Indian tribes is a continuing policy of the Executive Branch and of Congress. As petitioners point out (Pet. 11–12), the issue presented by this case has arisen in litigation involving the Klamath Indians in Oregon, where it has been decided by lower State and federal courts in a manner contrary to the disposition below. The Department of the Interior advises that no other instance of controversy has come to its attention. Whether the question will become a source of future litigation is unclear. In any given case, that will depend not only on the language of the termination statute but also on the nature of the tribal economy, the character of the rights

[2] To the extent that the court below may have adopted a contrary interpretation of the Treaty of 1854, we do not subscribe to its views.

[3] *E.g.*, Klamath Indians, 25 U.S.C. 564q(a); Mixed-Blood Ute Indians, 25 U.S.C. 677v; Western Oregon Indians, 25 U.S.C. 703(a); Alabama and Coushatta Indians, 25 U.S.C. 726; Paiute Indians, 25 U.S.C. 758; Wyandotte Indians, 25 U.S.C. 803; Peoria Indians, 25 U.S.C. 823; Ottowa Indians, 25 U.S.C. 848; Ponca Indians, 25 U.S.C. 980.

which can be asserted by the tribe, and the terms of the treaty allegedly giving rise to those rights.

Respectfully submitted.

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